Montana Law Review

Volume 43
Issue 2 *Summer 1982*

Article 5

July 1982

Limitations on State Power to Tax Natural Resource Development on Indian Reservations

William S. Dockins
University of Montana School of Law

COMMENT

LIMITATIONS ON STATE POWER TO TAX NATURAL RESOURCE DEVELOPMENT ON INDIAN RESERVATIONS

William S. Dockins

I. INTRODUCTION

States and Indian tribes constantly compete for revenues from taxable activities on Indian reservations. Nowhere is this struggle more evident and more intense than in the energy-rich Western states where both tribes and states are seeking to benefit from extensive mineral development on reservations. Estimates of the percentage of the nation's fossil fuels and other minerals lying on Indian trust lands vary,[1] but there is no doubt that the reserves are significant—more than sufficient to fuel a fight for revenues. Add grazing, recreation, fisheries, agriculture, timber, and other resources and the reservations become even more attractive targets for taxing schemes. Complex issues surface during the process of deciding which entity is entitled to receive tax revenues. This comment will examine both state power to tax reservation resources and limitations imposed on this power.[2]

Most state taxation of reservation resources has been indirect. Generally, state taxes are levied on the interests of non-Indian lessees, not on the tribe itself or individual reservation Indians.[3] The states' ability to justify only an indirect tax might appear to negate any substantial state taxation. Restrictive federal leasing provisions, however, have effectively fostered a potentially important state role. Leasing is often the only mechanism provided by Con-

1. COUNCIL OF ENERGY RESOURCE TRIBES, OFFICE OF SURFACE MINING, U.S. DEPT. OF THE INTERIOR, THE CONTROL AND RECLAMATION OF SURFACE MINING ON INDIAN LANDS 7-1 (1979).

2. Issues concerning tribal power to levy taxes on resource development are not discussed. The Supreme Court recently held that the Jicarilla Apache Tribe has the inherent power to impose a severance tax on mining activities undertaken by non-Indians on the reservation. Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894 (1982).

3. The term "reservation Indians" includes only those Indians who are members of the tribe occupying the reservation. In a recent case, the United States Supreme Court held that non-member Indians and non-Indians have the same status on the reservation for state taxation purposes. Washington v. Colville Confederated Tribes, 447 U.S. 134, 160 (1980).

gress for developing reservation resources,[4] and it has resulted in a prevalence of non-Indian development. Inadequate capital, technology, and management skills have hampered tribal resource development; often the tribes have been relegated to the status of mere royalty collectors. Consequently, the role of state taxation on the reservation has been significant because it reflects the interests of the non-Indian developers.

However, the manner of developing natural resources on the reservation is changing. Under self-determination policies, tribes are expressing a will to remove the responsibility for reservation resources from the federal government and place it under tribal authority.[5] Proposed legislation providing tribes with more latitude in resource development decisions[6] and a recent United States Supreme Court case upholding tribal power to levy severance taxes on non-Indian mineral lessees[7] supply impetus for increased tribal participation in developing reservation resources. If this trend continues, states may find it increasingly difficult to justify their taxes. However, non-Indians, especially energy corporations, are likely to remain in the forefront of resource development, as lessees or in other capacities. Their interests will continue to be objects of state taxation schemes.

II. State Power to Impose a Tax on Indian-Related Activities

Whether a state is empowered to tax Indians and Indian-related activities depends on an analysis of conflicting sovereign rights. Congressional authorization to tax is an overriding factor in determining if a state tax is valid. In the absence of this authorization, important factors to consider include the nature of the taxable transaction, the legal status of the parties being taxed, and the geographical locations of both the parties and the transactions.

---

4. *See* Note, *Indian Coal Authorities: The Concept of Federal Preemption and Independent Tribal Coal Development on the Northern Great Plains*, 53 N.D. L. Rev. 469, 484-92 (1977).

5. *Id.* at 470-75.

6. Sen. John Melcher (D. Mont.) recently introduced a bill that would permit Indian tribes to enter into a variety of agreements that may allow the tribes more flexibility in mineral resource development than is presently possible under the 1938 Tribal Mineral Leasing Act. S. 1894, 97th Cong., 1st Sess., 127 Cong. Rec. 14127 (1981).

7. Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894 (1982).

A. *State Taxation with Congressional Authorization*

1. *A Qualified Congressional Authorization*

A state tax is most easily validated if it is levied with express congressional authorization. Congress holds plenary power over Indian affairs and may empower the state to levy a tax.[8]

An important caveat is that the state tax levied must strictly adhere to the tax authorized by Congress. *Kennerly v. District Court*[9] indicates that courts will narrowly construe authorizing statutes. In *Kennerly*, the State of Montana asserted jurisdiction over Blackfeet Tribe members on the basis of the Tribal Council's consent jurisdiction. However, federal law provided that a state could acquire jurisdiction only by "affirmative legislative action" under Public Law 280,[10] or, after 1968, by consent of the tribe as manifested by a majority vote of enrolled members pursuant to the Indian Civil Rights Act.[11] Because Montana's actions did not comport with the explicit requirements of either of these authorizing statutes, the United States Supreme Court held that the state lacked jurisdiction over tribal members.[12]

2. Blackfeet Tribe v. Montana: *A Missed Opportunity*

The federal government has expressly authorized states to levy taxes on reservation resources in certain instances. One example is a 1924 Act,[13] section 398, which provides that states may tax the production of oil and gas on unallotted trust land. Relying on this authorization, Montana imposes several taxes on non-Indian oil and gas lessees.[14] However, most or all of these taxes do not

---

8. The power of the federal government over Indian affairs is plenary. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56-58 (1978); Lone Wolf v. Hitchcock, 187 U.S. 553, 566-68 (1903); United States v. Kagama, 118 U.S. 375 (1866); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

9. 400 U.S. 423 (1971).

10. 18 U.S.C. § 1162 (1976); 25 U.S.C. §§ 1321-1326 (1976); 28 U.S.C. § 1360 (1976).

11. 25 U.S.C. §§ 1301-1326 (1976).

12. Kennerly, 400 U.S. at 427-29.

13. 25 U.S.C. § 398 (1976), referred to in text as section 398, provides that:

> Unallotted land on Indian Reservations . . . may be leased . . . for oil and gas mining purposes . . . provided, that the *production* of oil and gas and other minerals on such lands may be taxed by the state in which said lands are located in all respects the same as *production* on unrestricted lands, and the Secretary of Interior is authorized and directed to cause to be paid the tax so assessed *against the royalty interest* on said lands: provided, however, that such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

(emphasis added).

14. Taxes imposed by Montana using 25 U.S.C. § 398 (1976) as authorization include:

adhere to the production tax expressly authorized by Congress.

In *Blackfeet Tribe v. Montana*,[15] the Tribe challenged the validity of Montana's oil and gas conservation and severance taxes and two other taxes on oil and gas interests held by non-Indian lessees. The sole issue brought by the Tribe was whether section 398 was impliedly repealed by the 1938 Tribal Mineral Leasing Act.[16] The Tribe relied heavily on the opinion of a Department of the Interior Solicitor which asserted that the 1938 Act was intended to replace the earlier leasing statutes, not to complement or incorporate them.[17] The court, finding this opinion inconsistent with several previous Department of the Interior opinions,[18] rejected the Tribe's argument, held that section 398 had not been repealed by implication, and granted summary judgment in favor of the state.

The analysis of the issues in *Blackfeet Tribe* ended where it should have begun. Unfortunately, the Tribe failed to allege that Montana's taxes did not strictly adhere to those authorized by section 398. Had this issue been raised, the court's determination that section 398 is still valid would not have meant an automatic endorsement of the state's taxes. Each of these taxes is subject to a test to determine if it is authorized by Congress. As in *Kennerly*, the state action—in this case a tax—must withstand a strict reading of the authorizing federal statute.

The state taxes contested in *Blackfeet Tribe* do not stand up to a strict reading of section 398. The statute authorizes a production tax, but the state imposes, among other taxes, a conservation tax and a severance tax. It seems unlikely that either of these taxes strictly qualifies as a tax on the production of oil and gas. These taxes, especially the severance tax, have regulatory purposes in addition to their functions as revenue-raising devices.[19]

A major inconsistency in Montana's taxes is that they are not levied against the party contemplated by section 398. Section 398 expressly provides that the tax shall be "assessed against the royalty interests on said lands." The royalty interest is held by the

---

(1) The Oil and Gas Conservation Tax, MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 82-11-131 (1981);

(2) The Resource Indemnity Trust Tax, MCA §§ 15-38-104 through -203 (1981);

(3) The Oil and Gas Severance Tax, MCA §§ 15-36-101 through -121 (1981);

(4) The Oil and Gas Net Proceeds Tax, MCA §§ 15-23-601 through -612 (1981).

15. 507 F. Supp. 447 (D. Mont. 1981).

16. 25 U.S.C. § 396a-g (1976).

17. Tax Status of the Production of Oil and Gas from Leases of the Fort Peck Tribal Lands under the 1938 Mineral Leasing Act, 84 Interior Dec. 905 (1977).

18. 507 F. Supp. 446, 451 (D. Mont. 1981).

19. *See* Crow Tribe v. Montana, 650 F.2d 1104, 1114 (9th Cir. 1981).

Indian lessor, yet the state imposes its taxes upon the non-Indian lessee.[20] The court in *Blackfeet Tribe* relied in part on *British-American Oil Producing Co. v. Board of Equalization*,[21] which held that Montana's net proceeds and gross production taxes were authorized by section 398. However, in *British-American Oil*, the United States Supreme Court did not address the lessor-lessee distinction.[22] These inconsistencies suggest the need for a close examination of section 398 to determine if it should be interpreted to grant states power to tax non-Indian mineral lessees.[23] Had the *Blackfeet Tribe* court followed the preceding analysis, any state tax levied on non-Indian oil and gas lessees that did not strictly adhere to section 398 would be subject to court-imposed limitations on state taxing powers that arise in the absence of congressional authorization.[24]

B. *State Taxation Without Congressional Authorization*

In the absence of express congressional authorization, a state may not directly tax reservation Indians or tribal property. This

---

20. The 1924 Act, 25 U.S.C. § 398 (1976), does not clearly state how the production tax is to be assessed. A 1927 Act extended this same tax to executive order reservations. *See* Act of March 3, 1927, Pub. L. No. 69-102, 44 Stat. 1347. The procedures for application of the tax are more plainly outlined in the 1927 Act and indicate how the tax authorized by the 1924 Act is to be assessed:

> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands with Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such *taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties*, and the Secretary of the Interior is hereby authorized and directed to cause such taxes *to be paid out of the tribal funds in the Treasury:* Provided, That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians.

25 U.S.C. § 398c (1976) (emphasis added).

21. 299 U.S. 159 (1936).

22. Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 121 U. PA. L. REV. 491, 515-20 (1973) (comprehensive discussion concerning validity of *British-American Oil;* suggests that section 398 may not grant states power to tax reservation lessees).

23. The validity of early federal leasing statutes, such as 25 U.S.C. § 398 (1976), is also suspect because these statutes arose out of policies attendant on the allotment of Indian lands. One intent of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), was to end allotment policies. The 1938 Tribal Mineral Leasing Act, 25 U.S.C. § 396a-g, passed subsequent to the Indian Reorganization Act, does not provide for state taxation and has been held to preempt state taxation in certain instances. *See* Crow Tribe v. Montana, 650 F.2d 1104, 1111-13 (9th Cir. 1981).

24. If Montana's taxes had been held not to be authorized by Congress, the issues and considerations that would have arisen would likely approximate those addessed in Crow Tribe v. Montana, 650 F.2d 1104 (9th Cir. 1981). *See infra* notes 86-104 and accompanying text.

principle was enunciated as early as 1867 in *The Kansas Indians* case,[25] when the Court held that the property of Shawnee Indians residing in Kansas was protected by treaties and laws of Congress, and was immune from state taxation. The rationale for this decision was stated in an earlier case, *Worcester v. Georgia.*[26] Chief Justice Marshall, writing for the majority, held that Indian nations were "distinct political communities, having territorial boundaries within which their authority is exclusive, and having a right to all the land within those boundaries, which is not only acknowledged, but guaranteed by the United States."[27] Georgia's laws were held to have no force within reservation boundaries and Georgia was denied criminal jurisdiction over Indian lands. The principles enunciated in *Worcester* have lost much of their conceptual simplicity after repeated state attacks over the past 150 years. They have been modified judicially and legislatively where essential tribal relations were not involved.[28] However, the policies underlying these principles remain, and there is still no express authority for direct state taxation of reservation Indians or tribal property.[29] Such taxation is presumed to be preempted by federal law.[30]

In contrast, state taxation of non-Indian activities on the reservations can proceed without express congressional authorization,[31] provided that the tax is not preempted by federal law or that the tax does not interfere with tribal self-government. Because non-Indian resource development is prevalent on reservations, these limitations on state power to tax non-Indian activities assume considerable importance and require detailed discussion.

---

25. Blue Jacket v. Comm'rs of Johnson County, 72 U.S. (5 Wall.) 737 (1866).

26. 31 U.S. (6 Pet.) 515 (1832).

27. *Id.* at 557.

28. Williams v. Lee, 358 U.S. 217, 219 (1959).

29. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973). *Mescalero* also illustrates the importance of the geographic component when considering the validity of a state tax. Activities that have their sites *outside* the reservation may be susceptible to state taxation. In *Mescalero* a state tax was upheld on the gross receipts of a ski resort that was operated by reseration Indians but located off the reservation.

30. Bryan v. Itasca C'ty, 426 U.S. 373, 376-77 (1976); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 475-81 (1976).

31. The United States Supreme Court validated state taxes directed at non-Indian activities in several early cases. *See, e.g.,* Utah & N. Ry. v. Fisher, 116 U.S. 28 (1885) (railway company susceptible to state property tax on privately owned right-of-way within reservation boundaries); Thomas v. Gay, 169 U.S. 264 (1898) (state property tax on cattle owned by non-Indians who held grazing leases was upheld).

III. Modern Limitations on State Taxation of Non-Indian Activities on The Reservation

A. *Federal Preemption*

Any state attempts to tax non-Indians on the reservation will be subject to possible preemption by federal law. Federal power to preempt attempted exercises of state jurisdiction arises from the supremacy clause of the United States Constitution.[32] The federal government derives its authority over Indian matters from constitutional sources, from its guardian-ward relationship with tribes, and—as a complement to federal guardianship—from the ultimate federal ownership of Indian land.[33] Federal preemption in Indian affairs has evolved from unique historical origins, the most important of which are the sovereignty considerations set out in *Worcester v. Georgia*.[34] Consequently, standards that have developed in other lines of federal preemption cases are of little use or application in Indian law.[35]

The modern approach to the use of preemption in Indian law was articulated in *Warren Trading Post v. Arizona Tax Commission*.[36] Arizona had levied a gross proceeds tax on a retailer who was federally licensed to transact business on the Navaho Indian Reservation. The Court held that the state tax was barred by statutes and regulations connected with the licensing scheme. The Court further said that the tax could frustrate Congress' intent to protect Indians from unfair or unreasonable prices, and that it would impermissibly put financial burdens on the retailer or Indians with whom the retailer deals.[37]

State exercises of jurisdiction on the reservation are preempted if they fall into either of two general categories. First, a state action may not directly conflict with a federal enactment.[38] Second, a state's actions are also barred if federal statutes, regulations or treaties occupy the field leaving no room for state interfer-

---

32. U.S. Const. art. VI, cl. 2.

33. Comment, *The Indian Battle for Self-Determination*, 58 Calif. L. Rev. 445, 447-51 (1970); *see also* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973) (federal authority over Indian matters derives from federal responsibility for regulating Indian commerce and for treaty making); Sherrick, *State Jurisdiction over Indians as a Subject of Federal Common Law: The Infringement-Preemption Test*, 21 Ariz. L. Rev. 85, 89-97 (1979) (develops federal preemption doctrine in terms of congressional power).

34. 31 U.S. (6 Pet.) 515 (1832).

35. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

36. 380 U.S. 685 (1965).

37. *Id.* at 691.

38. *E.g.*, Kennerly v. District Court, 400 U.S. 423 (1971).

ence.[39] The "occupying the field" category is conceptually more difficult than the "conflicting law" category, because it is often difficult to determine at what point federal enactments permeate a given area of law. It appears that the standard is broad since a state may not interfere with the purpose or operation of a federal statute, regulation, or policy.[40]

Several recent cases contesting the validity of various state actions on the reservation have been resolved by relying solely upon federal preemption. This reliance reflects Congress' plenary power over Indian matters.[41] Preemption is applied on a case-by-case basis. Rather than looking mechanically at federal, tribal, or state sovereignty, the courts make a particularized inquiry to see if the state action violates a federal law.[42] In most situations federal law delineates the boundaries between state and federal jurisdiction.[43] Where these boundaries are definite, there is no reason for a court to look to"platonic notions"[44] of inherent Indian sovereignty to resolve suits. Instead, Indian sovereignty is to be used as a "backdrop against which the applicable treaties and federal statutes must be read."[45] It is more straightforward to resolve most cases by reading and interpreting applicable federal enactments than it is to decide each case by directly applying inherent sovereignty concepts.

B. *The Self-Government Test*

1. *Source of the Test*

Essential to the application of the federal preemption doctrine is the existence of federal enactments to define the boundaries between state and federal jurisdiction. In situations where the boundaries are indistinct, the preemption analysis fails and more complex concepts of inherent Indian sovereignty come to the foreground to provide the basis for a second test—the self-government test.

The test was articulated by the Supreme Court in *Williams v. Lee*.[46] The Court stated that "essentially, absent governing acts of Congress, the question has always been whether the state action

39. *E.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).
40. Crow Tribe v. Montana, 650 F.2d 1104, 1109 (9th Cir. 1981).
41. *See supra* note 8.
42. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 149 (1980).
43. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 (1973).
44. *Id.*
45. *Id.*
46. 358 U.S. 217 (1959).

infringed on the right of reservation Indians to make their own laws and be ruled by them."[47] By its own language the test is subordinated to a federal preemption analysis. The courts look first to applicable "governing acts of Congress," and only if they are absent does the self-government test apply.[48]

Tribal power to exercise and maintain government functions arises not as a result of federal enactments but from vestiges of original tribal sovereignty.[49] Even though the tribes are no longer "possessed of the full attributes of sovereignty,"[50] they are "a separate people with the power of regulating their internal and social relations."[51] Tribal powers are inherent powers of sovereignty that have not been qualified or extinguished by congressional action.[52] Therefore, statutes and treaties of Congress should be viewed as a recognition of pre-existing powers of self-government, rather than as a source of these powers.[53] In short, inherent sovereign powers of tribes exist outside the sphere of sovereign federal powers and do not necessarily require federal recognition.

Recent cases have affirmed the existance of tribal sovereignty and self-government power. In *United States v. Mazurie*,[54] the Court held that Indian tribes were much more than "private, voluntary organizations"[55] and that they "possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life."[56]

However, *Oliphant v. Suquamish Tribe*[57] seemed to be a departure from previous concepts of the nature of tribal sovereignty. The Court held that tribes could not exercise criminal jurisdiction over non-Indians because it was inconsistent with their dependent status.[58] This case marked the first time since early decisions—where the tribes were held to have lost external aspects of sovereignty—that status rather than provisions of a treaty or stat-

47. *Id.* at 220.

48. Kennerly v. District Court, 400 U.S. 423, 427 (1971).

49. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-23 (U.N.M. ed. 1971); Powers of Indian Tribes, 55 Interior Dec. 14 (1939).

50. United States v. Kagama, 118 U.S. 375, 381-82 (1886).

51. *Id.*

52. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (U.N.M. ed. 1971).

53. Talton v. Mayes, 163 U.S. 376, 384 (1895) (powers of local tribal government existed prior to the Constitution).

54. 419 U.S. 544 (1975).

55. *Id.* at 557.

56. *Id.*

57. 435 U.S. 191 (1978).

58. *Id.* at 208.

ute were found to limit inherent sovereign powers.[59] The Tribe, therefore, was held to have been implicitly divested of criminal jurisdiction over non-Indians.[60] *United States v. Wheeler*[61] followed closely on the heels of *Oliphant*. The Court reaffirmed tribal power to exercise internal self-government among members, holding that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[62]

After *Oliphant* and *Wheeler* it was uncertain whether tribes retained civil jurisdiction over non-Indian activities on reservations. Subsequent cases have answered this question in the affirmative. In *Washington v. Colville Confederated Tribes*,[63] tribal powers to tax non-Indians engaging in economic activities on reservations were acknowledged. The Court stated that tribes could raise revenues from activities involving non-Indians if a strong tribal interest for doing so could be shown. Thus, the *Oliphant* rationale was sharply limited to the area of tribal criminal jurisdiction over non-Indians.

In *Montana v. United States*[64] the Court approached an issue of tribal regulation over non-members in an unusual manner. Rather than directly holding, as it had in the past, that tribal jurisdiction over non-members exists in certain situations, the Court stressed a general proposition that powers of tribal self-government cannot be exercised over non-members. However, the Court then recognized broad exceptions to this proposition. Distinguishing *Oliphant*, it held that tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands . . ." when non-Indian "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[65] *Montana v. United States* left no doubt that a tribe may exercise powers of self-government over non-members who enter

59. *E.g.*, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 548, 574 (1823) (tribes lack power to dispose of land at their will); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (tribes do not have power to deal directly with foreign nations).

60. 435 U.S. 191, 195-206 (1978).

61. 435 U.S. 313 (1978).

62. *Id.* at 323.

63. 447 U.S. 134, 152-54 (1980); *see also* Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894, 901 (1982) (Tribe's power to tax non-Indians doing business on the reservation "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services . . . .").

64. 450 U.S. 554 (1981).

65. *Id.* at 565-66.

into consensual relationships with a tribe.[66] Therefore the consensual relationship between tribes and non-Indian lessees, coupled with a strong Indian interest, would appear to place non-Indian resource development on reservations within the purview of tribal self-government powers.[67] Any state attempts to tax these lessees would be subject to the self-government test.

2. *Application: Infringement versus Balancing*

From its inception, the *Williams* self-government test has been difficult to apply. The test lacks concrete standards, and as a result, states have abused the test by attempting to employ it in a manner different from that which was intended. States have argued that their jurisdiction is presumed and is not barred unless tribes can prove that their self-government functions would be impaired.[68]

In *McClanahan v. Arizona Tax Commission*[69] the Court in dicta explained how to apply the self-government test. The Court made it clear that the test was to be employed only when non-Indians were subjects of state action. It was to be used in situations where "both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions . . . ,"[70] and was "to resolve this conflict by providing that the state could protect its interest up to the point where tribal self-government would be affected."[71] The Court interpreted the self-government test as an infringement test. That is, tribes possess, as a retained sovereign right, a certain field of self-government, and it is impermissible for states to intrude into that field. Implicit in this view is that a state would carry the burden of proving that its action did not infringe upon tribal government.

The self-government test was interpreted differently in *Washington v. Colville Confederated Tribes.*[72] There the Court used a balancing approach that "seeks an accommodation between the interests of the Tribes and the Federal Government on one hand, and those of the State, on the other."[73] The infringement analysis

66. *Id.* at 565.

67. This statement assumes that tribes have provisions in their constitutions empowering them to exercise jurisdiction over non-Indians (non-members).

68. *See, e.g.*, McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Kennerly v. District Court, 400 U.S. 423 (1971).

69. 411 U.S. 164 (1973).

70. *Id.* at 179.

71. *Id.*

72. 447 U.S. 134 (1980).

73. *Id.* at 156.

that followed from *McClanahan* was ignored in favor of this judicial balancing of the various interests asserted by the parties. Each party shares in the burden of proof in the sense that it must assert and prove its interests. The powers found in each entity will be directly proportional to the valid interests asserted.

The balancing approach, unlike the infringement analysis, severely compromises the self-government test. Unlike the more rigorous infringement approach, balancing does not imply a presumption of inherent Indian sovereignty. In its application it does not presuppose and establish a tribal right to self-govern before interests asserted by each entity are weighed. Rather, the balancing approach downgrades tribal government from an inherent sovereign right to merely an interest of the tribe which is to be weighed like any other when making a determination. For these reasons the infringement analysis is more consistent with concepts of inherent sovereignty and is a better guide than balancing for the application of the self-government test.

C. *Federal Preemption and Self-Government Tests as Independent Barriers to State Jurisdiction*

Some doubt has been cast by commentators upon the status of the self-government test as an independent barrier to state jurisdictions. It has been asserted that tribal government cannot of its own force prohibit state jurisdiction, and that the self-government test is a form of preemption analysis applicable only if tribal government is a federally protected right.[74] In *White Mountain Apache Tribe v. Bracker*,[75] the Court treated federal preemption and the self-government tests independently because "either standing alone can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members."[76] The Court noted that self-government and preemption are similar in that both depend on congressional action and that preemption analysis proceeds in light of traditional notions of self-government.[77] However, the reasons why the tests are independent of one another were not clarified in *Bracker*. To be consistent

74. *See* Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 HASTINGS L.J. 89, 112-20 (1978) (argues that the Court employed a federal preemption analysis in *Williams v. Lee* and that tribal self-government cannot of its own force prohibit state jurisdiction); *see also* Note, *Balancing the Interests in Taxations of Non-Indian Activities on Indian Lands*, 64 IOWA L. REV. 1459 (1979).

75. 448 U.S. 136 (1980).

76. *Id.* at 140.

77. *Id.*

with Indian law principles, especially those protective of tribal sovereignty, it is imperative that the tests be viewed as independent. The bases underlying federal preemption and the self-government test must be carefully distinguished.

A fundamental distinction between federal preemption and the self-government test is that each draws on a different source of power. Federal preemptive power arises from the United States Constitution while tribal self-government can ultimately be traced to retained inherent sovereign powers. The failure to treat the self-government test as an independent barrier to state jurisdiction results when tribal sovereign powers are ignored and self-government is viewed solely as a creature of federal law. Unquestionably, tribal government is a right that is retained by permission of Congress.[78] In that sense, tribal sovereign rights are subject to federal sovereign powers. However, this does not preclude tribal sovereign power from operating independently of the federal government with respect to interactions with a state.[79]

Confusion may arise when federal power reinforces the concept of self-government, consequently masking a tribe's inherent power. This occurs when tribal government is encouraged by federal policy[80] and as such takes on preemptive federal power. However, federal enactments resulting from this policy should be treated as a recognition of, but not a source of, inherent sovereign power.[81] When such federal policies are present, tribal and federal powers co-exist, giving tribal government a dualistic power structure. It is easy, and erroneous, to view tribal governments as backed by federal power and to forget that their ultimate source is inherent tribal power that is sufficient in itself to defeat many state intrusions onto reservations.

The status of federal preemption and self-government tests as independent barriers is supported by other considerations. The two tests are used in different situations. Preemption, for example, is employed when regulations and statutes define the boundaries between state and federal jurisdiction. Even though federal enactments govern in almost all cases,[82] there are areas where the boundaries are indistinct. Where the provisions of treaties and

78. *See supra* note 8.

79. Washington v. Colville Confederated Tribes, 447 U.S. 134, 154 (1980): "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."

80. *See, e.g.*, Indian Reorganization Act of 1934 (Wheeler-Howard Act), 25 U.S.C. §§ 461-479 (1976).

81. *See supra* text accompanying notes 49-53.

82. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 (1973).

statutes are not clear, application of preemption analysis would be little better than guesswork. The self-government test, therefore, is implemented in these instances to protect tribal interests. In other words, even if it is unclear from federal statutes or treaties whether a state action is permissible, it is a certainty that this action may not interfere with tribal government. Again, the self-government test is often ignored because the prevalence of federal enactments enables preemption to be used in most situations, while the self-government test need only be employed infrequently.

Federal preemption and the self-government test may also have different legal consequences. Preemption necessarily results in complete divestiture of a state's power to act in the preempted area of law. In contrast, the self-government test may result in a compromise. In *McClanahan* the court stated that the "state could protect its interest up to the point where tribal self-government would be affected."[83] Using this infringement approach,[84] the legal consequences would be similar to those of preemption: state power to act would be divested once it intruded into the "field" of tribal government. However, the balancing approach[85] seeks an accommodation of federal, tribal and state interests. The entities' power—tribe or state—would depend entirely upon the validity of the interests asserted, resulting in a judicially determined compromise.

D. *The "Substantial Connection" Test:* Crow Tribe v. Montana

The foregoing discussion indicates that any state action on a reservation is subject to the tribal self-government test if the action has not been authorized by Congress or if it is not preempted by federal law. Both the balancing and the infringement approaches to employing the test provide a means of analysis. Before either can be applied, however, the extent of tribal interests and powers must be established. *Crow Tribe v. Montana*[86] provides some guidelines for determining the scope of tribal government in the natural resource area.

The facts in *Crow Tribe* resemble those in the *Blackfeet Tribe* case examined earlier.[87] The Tribe sued to enjoin Montana from imposing its severance tax on coal mined by non-Indians on the reservation, as well as from coal deposits held in trust for the

83. *Id.* at 179.
84. *See supra* text accompanying note 71.
85. *See supra* text accompanying notes 72-73.
86. 650 F.2d 1104 (9th Cir. 1981).
87. *See supra* notes 13-24 and accompanying text.

Tribes located off the reservation. The suit was dismissed in the district court for failure to state a claim for relief. On appeal, the Ninth Circuit Court of Appeals reversed and remanded the case to the district court where, at the time of this writing, it awaits further disposition. Even though the case is not yet resolved, the Ninth Circuit opinion implies that the state tax may be held invalid.

Applying a preemption analysis, the court held that if the Tribe's allegations are true, the severance tax would thwart policies of the Tribal Mineral Leasing Act of 1938.[88] The magnitude of the tax could prevent the Tribe from receiving substantial economic benefits from its coal resource.[89] Nevertheless, the court recognized that an economic impact on the Tribe could be justified by legitimate state interests in imposing the tax. However, these interests do not include appropriation of Indian mineral wealth under the guise of state concerns to conserve and to benefit from nonrenewable resources.[90]

The court also addressed the Tribe's assertions that the state severance tax infringed on tribal self-government. Instead of using the infringement approach outlined in *McClanahan v. Arizona Tax Commission*,[91] the *Crow Tribe* court followed *Washington v. Colville Confederated Tribes*[92] and interpreted the self-government test "to require the reviewing court to balance the importance of state interest in asserting the particular authority against the impact on the Tribe's ability to govern itself effectively."[93]

The Tribe advanced two economic arguments to support their contention that the state tax infringed on its government. It claimed that the tax impaired its ability to levy its own severance tax and that the Tribe was deprived of bargaining power when negotiating with lessees for royalties. The court consolidated these arguments into the single issue of whether the state could permissibly deprive the Tribe of potential revenues from the development of its mineral resources. Relying on language from *Colville Confederated Tribes*, the court implied that the Tribe's interest in the tax revenues was stronger than the state's, because the revenues could ultimately be traced to mineral resources which are a *component* of the reservation land.[94] In contrast, the Supreme Court in *Col-*

88. Crow Tribe, 650 F.2d at 1111-12; 25 U.S.C. § 396a-g (1976).
89. Crow Tribe, 650 F.2d at 1113.
90. *Id.* at 1114.
91. 411 U.S. 164 (1973).
92. 447 U.S. 134 (1980).
93. 650 F.2d 1104, 1115 (9th Cir. 1981).
94. *Id.* at 1116-17.

ville Confederated Tribes held that revenue gained from the on-reservation sale of cigarettes to non-Indians lacked a "substantial connection"[95] to Indian land, and therefore a state tax on these revenues was upheld.

The distinction between activities that do or do not have a substantial connection to the land could play a significant role in future resource taxation cases, especially when the tax is not pre-empted by federal law and the case turns on a determination of the limits on powers of tribal government. The courts appear ready to recognize that incidental economic impact, imposed on a tribe when a state taxes a non-Indian lessee, may interfere with tribal government functions.[96] In certain cases the courts may ignore the legal incidence of the tax and concentrate on the economic burden placed upon the tribe. However, it appears that these economic hardship arguments may have force only when the taxed activity has a substantial connection to Indian land.

Future decisions must determine which activities possess this substantial connection. The connection most likely exists in resource-related activities. For example, the court in *Crow Tribe* recognized that mineral resources are a *component* of reservation land. This is consistent with *United States v. Shoshone Tribe*,[97] in which the Court held that minerals and standing timber are *constituents* of the land.[98] Somewhere between cigarette sales and natural resource development a line must be drawn setting apart those activities that have a substantial connection to Indian land from those that do not.

Agua Caliente Band of Mission Indians v. County of Riverside[99] illustrates how difficult it may be to make this distinction. In this case, allottees of land held in trust sued to enjoin the county

95. 447 U.S. 134, 156 (1980).

96. Compare the apparent readiness of courts to accept arguments concerning indirect economic impact incident to state taxation of non-Indian lessees with the fate of similar arguments in cases brought under the federal instrumentality doctrine. In several early cases the Court extended this doctrine to the non-Indian lessee and even to the lease itself. Incidental economic impact on tribes was found sufficient to bar the state tax. *See, e.g.*, Gillespie v. Oklahoma, 257 U.S. 501 (1922); Choctaw & G. R.R. v. Harrison, 235 U.S. 292 (1914). These cases were later overruled and tax exemptions were refused to those holding government leases unless the effects upon government functions were direct and substantial. Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938); Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949). *See also* Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972) (court refused to find that non-Indian lessees of allotted land, or lease itself were federal instrumentalities; indirect economic impact arguments were held untenable).

97. 304 U.S. 111 (1938).

98. *Id.* at 116.

99. 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972).

from imposing a possessory interest tax. The lands were leased to non-Indian lessees. Only the cash value of the lessees' interest was taxed. Even though the lessees' activity was integrally connected to Indian land, the court held that indirect economic effects upon the Tribe, such as removal of a better bargaining position, did not invalidate the tax.

A few years later, the same issue reappeared in *Fort Mojave Tribe v. County of San Bernadino.*[100] The Tribe's reservation encompassed portions of three states. One state, California, levied a possessory interest tax on non-Indian lessees of reservation land within that state. The leases between the Tribe and the non-Indian lessees were long-term and contemplated significant development of the land. A resort, housing project, and possibly a nuclear plant were to be built. The Tribe argued that the tax would slow development in one portion of the reservation and that it interfered with the Tribe's power to levy its own possessory interest tax. The court rejected both arguments because the effect of the state tax would be indirect and would only result from an inability to market a tax exemption. Because the taxes were imposed by different taxing authorities, double taxation would not result.[101]

The holdings in *Fort Mojave Tribe, Agua Caliente Band of Mission Indians,* and *Crow Tribe,* when read together, suggest that a substantial connection to Indian land exists only when the activity involves an actual component or constituent of the land itself, such as timber or minerals. Activities requiring severance of a component, with a consequential decrease in the value of the land, may be immune from state taxation because incidental economic burdens of the tax deleteriously and impermissibly interfere with tribal government. However, if land development by non-Indians results in an increase in the value of Indian land, it may be possible for the state to tax the non-Indian lessee's interest regardless of the incidental economic consequences to the tribe.

Therefore, absent preemption by federal law, it appears that a state may tax any non-Indian interests on the reservation unless the taxable activity involves an actual component of Indian land.[102] The tax, however, must be carefully tailored to reflect legitimate state interests.[103] Powers inherent in tribal self-government will

100. 543 F.2d 1253 (9th Cir. 1976), *cert. denied,* 430 U.S. 983 (1977).

101. *Id.* at 1258-59.

102. These non-Indian interests may also be subject to a tribal tax. The existence of a state tax does not prohibit the tribes from taxing the same activity. All that is being said here is that in certain situations the tribal government lacks power to oust state taxing jurisdiction. *See supra* note 2.

103. Washington v. Colville Confederate Tribes, 447 U.S. 134, 163 (1980).

defeat indirect attempts[104] by the state to tax an actual component of the land when the tax is not congressionally authorized.

IV. CONCLUSION

The validity of a state tax imposed on a non-Indian activity on the reservation depends upon the result of a relatively complex analysis of conflicting sovereign rights. If a state tax is based on congressional authorization, its provisions must strictly comply with the federal authorizing statute. In the absence of this authorization, the tax is valid only if it is not preempted by federal law or if it does not impair tribal government. The courts have approached the self-government test in two ways—a judicial balancing of interests and a strict infringement test. The latter is more consistent with fundamental Indian law principles.

The federal preemption and tribal self-government tests stand as independent barriers to the exercise of state jurisdiction. Federal preemptive power has a constitutional source while tribal government derives its power from inherent tribal sovereignty. Inherent tribal power, although retained by congressional permission, is sufficient to preclude certain state actions on the reservation.

The cases to date suggest that, unless preempted by federal law, a state may tax any non-Indian interest on the reservation that does not have a substantial connection to Indian lands. It appears that this substantial connection exists when an activity involves an actual component of the land. When this connection is present, a tribe may validly assert that economic harm incident to the taxation of the non-Indian interest impermissibly interferes with tribal government.

Most natural resource development on the reservation necessarily has a substantial connection to Indian land. Absent congressional authorization, it is unlikely that a state can justify taxation of resource development by non-Indian lessees that results in severing a component from the land.

104. The state lacks power to directly tax a component of Indian land. *See supra* text accompanying notes 24-29.